

**United States Department of Labor
Employees' Compensation Appeals Board**

J.J., Appellant

and

**ARCHITECT OF THE CAPITOL, CAPITOL
VISITOR CENTER, Washington, DC, Employer**

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**Docket No. 17-0825
Issued: June 13, 2017**

Appearances:
Daniel M. Goodkin, Esq.
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 27, 2017 counsel filed a timely appeal from a February 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.

ISSUE

The issue is whether OWCP abused its discretion by denying an attorney's fee in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016.

FACTUAL HISTORY

On October 7, 2011 OWCP accepted that appellant, then a 34-year-old visitor's guide, sustained a sesmoid fracture of her great right toe due to the standing and walking required by

¹ 5 U.S.C. § 8101 *et seq.*

her job over time. Appellant intermittently stopped work and received disability compensation on the daily rolls for intermittent periods beginning October 19, 2011.²

Appellant was terminated from the employing establishment effective March 4, 2015. She filed a recurrence claim (Form CA-2a) alleging a recurrence of disability for the period March 4, 2015 and continuing. In a June 8, 2016 decision, OWCP accepted appellant's recurrence claim for the period March 4 to September 10, 2015.³

On June 21, 2016 counsel submitted a fee application in the amount of \$2,275.50 for services rendered from December 3, 2015 to May 11, 2016. The fee application was accompanied by a statement from appellant, signed on June 6, 2016, indicating her agreement with the requested fee amount and acknowledging that the fee was her responsibility.

In a June 24, 2016 decision, OWCP approved the attorney's fee application in the amount of \$2,275.50 for services rendered from December 3, 2015 to May 11, 2016.

In a July 29, 2016 letter to OWCP, counsel requested, on behalf of appellant, that the accepted work-related conditions be expanded to include migraine headaches. He attached a statement from appellant in which she discussed why she felt her migraine headaches were related to her former employment. In an August 4, 2016 letter, OWCP requested that appellant submit additional evidence in support of her claim to expand the accepted conditions.

By letter dated September 8, 2016, counsel submitted a fee application in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016. He attached a statement of services containing language asking appellant whether she approved of the fee application in the amount of \$2,969.00. Appellant had not signed the document.

In a September 21, 2016 letter, OWCP forwarded to appellant a copy of counsel's fee application in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016. It provided her 30 days to comment on the fee application request and to denote whether the fee charged was reasonable and appropriate.

On September 23, 2016 OWCP received a September 19, 2016 letter from appellant to counsel in which appellant indicated that she would not be approving the fee application in the amount of \$2,969.00 because she felt that counsel's services were not useful with respect to her claim to expand the accepted conditions. In an October 14, 2016 letter to OWCP, appellant advised that she was rejecting the fee application in the amount of \$2,969.00, noting that the fee was not reasonable because counsel's services were not useful to her as a claimant.⁴ She also submitted a copy of a December 4, 2015 e-mail she had sent to counsel noting that she was

² Appellant received disability compensation on the periodic rolls for the period May 5, 2013 to October 18, 2014.

³ Appellant received disability compensation on the daily rolls for the period March 4 to September 10, 2015.

⁴ Appellant asserted that a majority of counsel's time was spent on updates and meetings to discuss the case, and that no legal action had been taken to move the case forward.

financially unable to invest any more money into the case, and that she no longer wished to employ his services.

In a February 9, 2017 decision, OWCP denied the attorney's fee application in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016 noting that appellant had not signed a fee approval for these services. It advised that appellant had contested the fees indicating that she did not find the services of counsel's office useful, that a majority of the time was spent on updates and meetings to discuss the case, and that no legal action had been taken to move the case forward. OWCP noted that she provided a December 4, 2015 e-mail to counsel noting that she was financially unable to invest any more money into the case, and that she no longer wished to employ his services.

LEGAL PRECEDENT

It is not the function of the Board to determine the fee for services performed by a representative of a claimant before OWCP. That function is within the discretion of OWCP based on the criteria set forth in Title 20 of the Code of Federal Regulations and mandated by Board decisions. The sole function of the Board on appeal is to determine whether the action of OWCP constituted an abuse of discretion.⁵ Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁶

Section 10.703(a)(2) of the Code of Federal Regulations provides in pertinent part that a representative must submit a fee application which includes a statement of agreement or disagreement with the amount charged, signed by the claimant.⁷ While the regulations provide that a fee application is deemed approved when it is accompanied by a signed statement indicating the claimant's agreement with the fee,⁸ the regulations do not specifically provide for approval when a claimant fails to contest a fee application.⁹ When a fee application has been disputed, OWCP is required to provide the claimant with a copy of the fee application and request the submission of further information in support of any objection.¹⁰ After the claimant has been afforded a reasonable time to respond to the request, OWCP will then proceed to review the fee application. Pursuant to section 10.703(c), when a fee is in dispute OWCP will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services;

⁵ *Alvin T. Groner, Jr.*, 47 ECAB 588 (1996); *Edward Snider*, 39 ECAB 1268 (1988).

⁶ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁷ 20 C.F.R. § 10.703(a)(2).

⁸ *Id.* at § 10.703(b).

⁹ See *Helen J. Cavorley*, Docket No. 02-2325 (issued February 7, 2003).

¹⁰ 20 C.F.R. § 10.703(c).

(ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services.¹¹

ANALYSIS

On September 19, 2016 counsel submitted a fee application in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016. In a September 21, 2016 letter, OWCP provided appellant 30 days to comment on the fee application request and to denote whether the fee charged was reasonable and appropriate. It received communications from appellant indicating that she would not approve the fee application in the amount of \$2,969.00 because she felt that counsel's services were not useful. In a February 9, 2017 decision, OWCP denied the requested fee of \$2,969.00 without considering any of the factors enumerated in section 10.703(c) of OWCP's regulations. Rather, it based its determination on appellant's responses to its June 21, 2016 letter in which she indicated that she would not sign a statement approving the fee application.¹²

OWCP's regulations provide that, when a fee is in dispute, OWCP will determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (i) Usefulness of the representative's services; (ii) The nature and complexity of the claim; (iii) The actual time spent on development and presentation of the claim; and (iv) Customary local charges for similar services.¹³ Consequently, the Board finds that the case is not in posture for decision regarding whether OWCP abused its discretion by denying an attorney's fee in the amount of \$2,969.00 and the case must be remanded to OWCP to consider the attorney's fee application according to the applicable regulatory procedures.¹⁴

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP abused its discretion by denying an attorney's fee in the amount of \$2,969.00 for services rendered from May 20 to August 2, 2016.

¹¹ *Id.*

¹² OWCP also mentioned a December 4, 2015 e-mail in which appellant indicated that she wished to terminate counsel's services. The Board notes, however, that appellant continued to enlist counsel's services after that date and she agreed to a fee application in the amount of \$2,275.50 for services rendered from December 3, 2015 to May 11, 2016. In a June 24, 2016 decision, OWCP approved the fee application in the amount of \$2,275.50.

¹³ *See supra* note 11.

¹⁴ *See K.C.*, Docket No. 06-2130 (issued July 24, 2007). In *K.C.*, the Board found that the case was not in posture for decision regarding whether OWCP abused its discretion with respect to its determination regarding a fee application because OWCP had not adequately considered the factors denoted in 20 C.F.R. § 10.703(c).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: June 13, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board